

CIMB Bank Bhd (formerly known as Bumiputra-Commerce Bank Bhd) v World Nova Sdn Bhd (Pang Ming Wa, proposed intervener)

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HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO MT(3)24-254 OF 2002 AND EXECUTION APPLICATION NO 38-756 OF 2003
MOHD ZAWAWI JC
28 SEPTEMBER 2009

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Civil Procedure — Costs — Application of taxation of bill of costs — Auction aborted by order of court — Whether deputy registrar exercised his discretion correctly under r 7(a) of the Johor Auction Sales Enactment 1932 — Whether deputy registrar erred in using r 7(b) as a guide for exercising discretion under r 7(a) of the Enactment

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Seven pieces of property with a total reserve price of RM46,980,000 were ordered to be sold by auction by the High Court of Johor Bahru under foreclosure proceedings arising from two suits against the defendant. An auctioneer was duly appointed and the auction was scheduled on 12 July 2007. Prior to 12 July 2007, there were several postponements of the auctions scheduled. These auctions were not postponed due to any order of the High Court and the auctioneer was paid his commission as determined according to r 7(b) of the Johor Auction Sales Enactment 1932 ('the Enactment'). Thereafter one Pang Ming Wa filed an application to intervene in the two suits ('the proposed intervener') and also applied to set aside the order for sale of the seven properties. The High Court then ordered the auction scheduled on 12 July 2007 to be aborted pending the applications filed by the proposed intervener. The auctioneer who had carried out all the necessary acts required for the auction prior to the order to have the auction aborted submitted a bill of cost. The bill included three items, that is, RM117,507 as a fee pursuant to r 5 of the Enactment, RM851 as out of pocket expenses and RM804 for disbursements. The proposed intervener requested for a taxation of the auctioneer's bill of cost. On 3 December 2007, the deputy registrar hearing that application for taxation allowed the sum claimed by the auctioneer. The deputy registrar had used r 7(b) of the Enactment as a guideline to exercise his discretion under r 7(a) of the Enactment in awarding the auctioneer's claim of RM118,070.50. This was the proposed intervener's application under O 59 r 36 of the Rules of the High Court 1980 ('the RHC') to review that decision. The proposed intervener submitted that the deputy registrar had exercised his discretion erroneously and that therefore his decision ought

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A to be set aside. In support of his contention the proposed intervener submitted that as the auction scheduled on 12 July 2007 was aborted by an order of the High Court r 7(a) of the Enactment applied, and that under r 7(a) of the Enactment the deputy registrar could only exercise his discretion in determining the remuneration of the auctioneer by way of taxation according to O 59 rr 20 and 21 of the RHC and not according to r 7(b) of the Enactment. The auctioneer on the other hand submitted that the deputy registrar had applied the correct principles when he used r 7(b) of the Enactment because the facts of this case were almost identical to that under r 7(b). The only issue for determination in this application was whether the deputy registrar had exercised his discretion correctly under r 7(a) of the Enactment.

D **Held**, allowing the application for review with no order as to costs:

- (1) The deputy registrar had erred in using r 7(b) as a guide for the exercising of his discretion under r 7(a) of the Enactment because both sub-rr (a) and (b) are distinct and applied to different situations. Rule 7(b) is only applicable where the auction was postponed because the reserve price was not met whereas r 7(a) is applicable to an auction postponed pursuant to an order of the court. Hence the discretion under r 7(b) had nothing to do with the provisions of r 7(b). It is settled law that the plain meaning of the words in the statute must be applied if there is no ambiguity. Rule 7(a) of the Enactment is very clear and provides that the auctioneer's remuneration shall be at the taxing officer's discretion whereas r 7(b) does not refer to any taxing officer but merely fixes the commission of the auctioneer. Thus by using r 7(b) as a guide the deputy registrar had fettered his discretion to consider judicially all the circumstances which were relevant to this case (see paras 15–17).
- (2) In short the deputy registrar had merely awarded what was billed by the auctioneer without a proper taxation. The bill of costs submitted by the auctioneer neither met the requirements of O 59 r 20 of the RHC nor provided any evidence as to how the auctioneer arrived at his fee of RM117,507.50. Further the deputy registrar failed to see that the auctioneer had not made a claim pursuant to r 7(a) and on this basis alone the auctioneer was not entitled to the fee of RM117,507.50 he had claimed. In fact the deputy registrar had fettered his discretion when he adopted the half commission scale under r 7(b) and passed it off as exercising his discretion under r 7(a). The award of RM118,007.50 to the auctioneer was clearly a result of the application of the wrong principles and was devoid of any basis (see para 22).

[Bahasa Malaysia summary]

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Tujuh bidang tanah dengan harga rizab keseluruhan RM46,980,000 diperintahkan untuk dijual melalui lelongan oleh Mahkamah Tinggi Johor Bahru di bawah prosiding halang tebus bermula daripada dua guaman terhadap defendan. Pelelong telah dilantik dan lelongan dijadualkan pada 12 Julai 2007. Sebelum 12 Julai 2007, terdapat beberapa penangguhan lelongan dijadualkan. Lelongan-lelongan ini tidak ditangguhkan menurut perintah daripada Mahkamah Tinggi dan pelelong dibayar komisyennya menurut k 7(b) Enakmen Jualan Lelongan Johor 1932 ('Enakmen'). Kemudiannya Pang Ming Wa memfailkan permohonan untuk mencelah dalam dua guaman ('pencelah yang dicadangkan') dan juga memohon untuk mengetepikan perintah jualan ketujuh-tujuh tanah tersebut. Mahkamah Tinggi kemudiannya mengerahkan lelongan yang dijadualkan pada 12 Julai 2007 ditangguhkan sementara menunggu permohonan-permohonan yang difailkan oleh pencelah yang dicadangkan. Pelelong yang menjalankan tindakan-tindakan yang diperlukan untuk lelongan sebelum perintah untuk menangguhkan lelongan telah mengemukakan bil kos. Bil tersebut termasuk tiga butiran, iaitu RM117,507 sebagai bayaran menurut k 5 Enakmen, RM851 sebagai perbelanjaan peribadi dan RM804 untuk pembelanjaan. Pencelah yang dicadangkan meminta agar bil kos pelelong ditetapkan. Pada 3 Disember 2007, timbalan pendaftar yang membicarakan permohonan untuk penetapan, membenarkan jumlah yang dituntut oleh pelelong. Timbalan pendaftar menggunakan k 7(b) Enakmen sebagai garis panduan untuk menggunakan budi bicaranya di bawah k 7(a) Enakmen dalam mengawardkan tuntutan pelelong berjumlah RM118,070.50. Ini merupakan permohonan pencelah yang dicadangkan di bawah A 59 k 36 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk menyemak keputusan tersebut. Pencelah yang dicadangkan menghujah bahawa timbalan pendaftar telah khilaf dalam menggunakan budi bicaranya dan oleh itu keputusannya perlu diketepikan. Sebagai menyokong hujahannya, pencelah yang dicadangkan menghujah bahawa memandangkan lelongan yang dijadualkan pada 12 Julai 2007 ditangguhkan oleh perintah Mahkamah Tinggi, maka k 7(a) Enakmen terpakai, dan bahawa di bawah k 7(a) Enakmen, timbalan pendaftar hanya boleh menggunakan budi bicaranya untuk menentukan pendapatan pelelong melalui penetapan menurut A O 59 kk 20 dan 21 KMT dan bukannya menurut k 7(b) Enakmen. Pelelong sebaliknya menghujah bahawa timbalan pendaftar telah menggunakan prinsip yang betul apabila dia menggunakan k 7(b) Enakmen kerana fakta-fakta dalam kes ini hampir sama dengan fakta-fakta di bawah k 7(b). Satu-satunya isu untuk ditentukan dalam permohonan ini ialah sama ada timbalan pendaftar telah menggunakan budi bicaranya dengan betul di bawah k 7(a) Enakmen.

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A **Diputuskan,** membenarkan permohonan untuk semakan dan tiada perintah mengenai kos:

- B** (1) Timbalan pendaftar telah khilaf dalam menggunakan k 7(b) sebagai panduan untuk menggunakan budi bicaranya di bawah k 7(a) Enakmen kerana kedua-dua sub-k (a) dan (b) adalah berbeza dan diguna pakai dalam situasi-situasi yang berbeza. Kaedah 7(b) hanya terpakai di mana lelongan ditangguhkan kerana harga rizab tidak dipersetujui manakala k 7(a) terpakai apabila lelongan ditangguhkan mengikut perintah mahkamah. Oleh itu budi bicara dalam k 7(b) tidak berkaitan dengan peruntukan-peruntukan k 7(b). Adalah merupakan undang-undang tetap bahawa maksud harfiah perkataan-perkataan dalam statut perlu digunakan sekiranya tiada kekaburan. Kaedah 7(a) Enakmen adalah sangat jelas dan memperuntukkan bahawa pendapatan pelelong mengikut budi bicara pegawai penaksir di mana k 7(b) tidak merujuk kepada mana-mana pegawai penaksir tetapi hanya sekadar menetapkan komisyen pelelong. Oleh itu dengan menggunakan k 7(b) sebagai panduan, timbalan pendaftar telah mengehadkan budi bicaranya untuk mempertimbangkan secara adil kesemua keadaan yang relevan kepada kes ini (lihat perenggan 15–17).
- C**
- D**
- E** (2) Secara ringkasnya, timbalan pendaftar hanya mengawardkan apa yang dibilkan oleh pelelong tanpa penetapan yang sewajarnya. Bil kos yang dihujahkan oleh pelelong tidak memenuhi keperluan A 59 k 20 KMT dan tidak dibuktikan oleh apa-apa keterangan yang menunjukkan bagaimana pelelong boleh mendapat jumlah bayaran RM117,507.50.
- F** Selanjutnya timbalan pendaftar gagal untuk melihat bahawa pelelong tidak membuat tuntutan menurut k 7(a) dan atas dasar ini semata-mata, pelelong tidak berhak untuk bayaran RM117,507.50 yang dituntutnya. Timbalan pendaftar sebenarnya telah mengehadkan budi bicaranya apabila dia menggunakan skala separuh komisyen di bawah k 7(b) dan memutuskannya dengan menggunakan budi bicaranya di bawah k 7(a). Award RM118,007.50 kepada pelelong secara jelas merupakan hasil penggunaan prinsip yang salah dan tidak berasas sama sekali (lihat perenggan 22).]
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H **Notes**

For a case on application for taxation of bill of costs, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 1898.

I **Cases referred to**

Bar Council v Datuk Kanagalingam [2000] 3 CLJ 697, FC (refd)
Chan Kok Choon JP v MBf Finance Bhd [2001] 1 MLJ 5; [2000] 4 CLJ 453, CA (refd)
Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 169, FC (refd)

- Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors* [2002] 3 MLJ 705; [2002] 4 CLJ 259, FC (refd) **A**
- Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374; [1999] 7 CLJ 481, HC (refd)
- Maror & St Mellons Rural District Council v Newport Corporation* [1952] AC 189, HL (refd) **B**
- MC Corbett v Ipoh Tin Dredging Ltd* [1936] MLJ 222; [1934] 1 LNS 46, HC (refd)
- Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645, FC (refd)
- PP v Tan Tatt Eek & other appeals* [2005] 1 CLJ 713, FC (refd) **C**
- Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi* [1997] 2 MLJ 118; [1997] 2 CLJ 409, CA (refd)
- Public Bank Berhad v Er Cheng Chau* [1994] 4 CLJ 971, HC (folld)
- Sarjit Singh Kahira v State Public Service Commission* [2007] 8 MLJ 86; [2007] 5 CLJ 156, HC (refd) **D**
- Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146; [1973] 1 LNS 143, HC (refd)
- Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Berhad, intervener)* [1995] 2 MLJ 421; [1995] 2 CLJ 846, HC (refd)
- United Malayan Banking Corporation Bhd v Earnest Cheong Yong Yin* [2008] 3 MLJ 1; [2007] 2 CLJ 332, FC (refd) **E**
- United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd* [1991] 3 MLJ 181; [1991] 4 CLJ (Rep) 163, HC (refd)
- United Oriental Assurance Sdn Bhd v Penang Medical Centre Sdn Bhd* [1999] 2 MLJ 542; [1999] 2 CLJ 583, CA (refd) **F**
- Vincent Cheng v The Minister For Home Affairs & Ors* [1990] 1 MLJ 449; [1992] 4 CLJ (Rep) 527, HC (refd)
- Warburton v Loveland* (1932) 2 D & Cl 480, HL (refd)
- Woodward v Watt* (1853) 2 E & B 452, QBD (refd)
- Yeo Peck Chie v KS Gill & Co* [1946] MLJ 131, HC (refd) **G**

Legislation referred to

- Johor Auction Sales Enactment 1932 rr 5, 7(a), (b)
- Rules of the High Court 1980 O 59, O 59 rr 20, 21, 21(2), 36 **H**
- Leney Andrew Albert (Syed Alwi, Ng & Co) for the plaintiff.*
- LS Chin (Hema Rubini & Co) for the proposed intervener.*

Mohd Zawawi JC (now J):

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[1] This application under O 59 r 36 of the Rules of the High Court 1980 ('the RHC') was brought before me by the proposed intervener to review the learned deputy registrar's decision under r 7(a) of the Johor Auction Sales Enactment 1932 ('the Enactment').

- A** [2] The learned deputy registrar had taxed the auctioneer's bill of cost on 4 January 2008 and had allowed a sum of RM118,007.50 as his remuneration for an auction scheduled on 12 July 2007 that was aborted by an order of the High Court.
- B** [3] After hearing the parties, I allowed the application.
- [4] By way of background, it is material to state the facts which gave rise to the present application. The undisputed facts are as follows:
- C** (4.1) Chang Keok Hai ('the auctioneer') was appointed for the auction of properties ordered to be sold by the High Court of Johor Bahru under the following foreclosure proceedings:
- D** (a) Johor Bahru High Court Originating Summons No 24-254 of 2007: Southern Bank Bhd v World Nova Sdn Bhd ('suit 254'); and
- (b) Johor Bahru High Court Originating Summons No 24-2202 of 2002: Southern Bank Bhd v World Nova Sdn Bhd ('suit 2202').
- (4.2) The auction was scheduled on 12 July 2007;
- E** (4.3) Prior to 12 July 2007, there were several postponements of the auctions scheduled. These auctions were not postponed due to any order of the High Court. The auctioneer claimed and was paid his commission as determined according to r 7(b) of the Enactment;
- F** (4.4) The last auction was scheduled on 12 July 2007. However, the said auction was aborted on the order of Jeffrey Tan J on 11 July 2007 for the following reasons:
- G** (a) Pang Ming Wa, the proposed intervener, has filed the following application:
- For suit 254:
- (i) Application to intervene (encl 43);
- H** (ii) Application to set aside order for sale dated 6 August 2003 (encl 44); and
- (iii) Application to stay order dated 6 August 2003.
- For suit 2552:
- I** (i) Application to intervene (encl 20);
- (ii) Application to set aside order dated 18 March 2004 (encl 21); and
- (iii) Application to stay order dated 18 March 2004.

- (b) The application was scheduled for hearing before Jeffrey Tan J on 11 July 2007. As the applications were not served on the chargor ('World Nova Sdn Bhd'), as it was already wound up, the learned judge directed that the cause papers be served on the official receiver instead. A
- (c) The learned judge was prepared to postpone the auction on 12 July 2007 provided the issue of costs can be resolved; B
- (d) It was agreed by the parties on 11 July 2007 that:
 - (i) The proposed intervener will deposit RM121,497.50 with the chargor's solicitors by 10am of 12 July 2007 to secure the auctioneer's fees and expenses thrown away for the aborted auction; and C
 - (ii) The proposed intervener will pay RM7,000 as cost of the day by the next hearing date. D
- (4.5) The learned judge ordered the auction 12 July 2007 to be aborted on the terms agreed. The agreed sums were deposited and paid and the auction on 12 July 2007 was aborted; E
- (4.6) The chargor and chargee eventually reached a settlement over the subject matter of the claims; F
- (4.7) The auctioneer had done all things necessary for the said auction including to the following:
 - (i) Preparing the proclamation in four languages; G
 - (ii) Distribution of the proclamation of sale to residents, bankers, solicitors and to public at large; H
 - (iii) Posting the proclamation of sale at the places where the properties are located; I
 - (iv) Posting the proclamation of sale at the Johor Bahru High Court notice board; and
 - (v) Advertising the proclamation of sale in *The Star* and *Sin Chew Jit Poh* newspapers on 14 June 2007.
- (4.8) The said auction involved seven pieces of properties at a total reserve price of RM46,980,000;
- (4.9) The auctioneer submitted a bill of cost dated 16 July 2007. Three main items were claimed:
 - (a) RM117,507,500 — fee claimed pursuant to r 5 of the Enactment;

- A (b) RM851 — out of pocket expenses; and
(c) RM804 — for disbursements.
- (4.10) The auctioneer's enclosed the bill of costs to the chargee's solicitor vide a letter dated 25 July 2007. The letter stated:
- B ... The auction scheduled on 12.7.2007 was called off at your request, as we come to understand that the Intervener has in time placed a banker cheque with your office to cover all auctioneer's fees, costs and commission as stated in your letter of 11.7.2007.
- C We enclose herewith our Bill of Costs dated 16.7.2007 for RM119,162.50 duly approved and certified by the Johor Bahru High Court for your early settlement ...
- D (4.11) A copy of the bill of cost was forwarded to the proposed intervener's former solicitors. By a letter dated 22 August 2007, the proposed intervener's solicitors wrote to the registrar of the High Court requesting for a taxation of the auctioneer's bill of cost;
- E (4.12) The learned deputy registrar taxed the bill of costs on 3 December 2007. The decision was rendered on 4 January 2008. The learned deputy registrar allowed the sum of RM118,007.50 as claimed by the auctioneer; and
- F (4.13) The proposed intervener filed an application to review the decision. The grounds for review were set out in the proposed intervener's objection to taxation ('bantahan ke atas penetapan') (see encl 62, exh LC1). The learned deputy registrar maintained his decision to award RM118,007.50, inter alia, on the following grounds:
- G (a) that he has discretion pursuant to r 7(a) of the Enactment to award the costs;
- H (b) that he may use and indeed used r 7(b) of the Enactment as a guideline to exercise his discretion under r 7(a); and
- (c) that the amount awarded was reasonable.

SUBMISSION BY LEARNED COUNSEL FOR THE PROPOSED INTERVENER

[5] Learned counsel for the proposed intervener submitted that the learned deputy registrar had exercised his discretion erroneously and hence his decision ought to be set aside. According to learned counsel, there are three

distinct points that must be noted of the Enactment, particularly r 7(a) and 7(b):

- (a) rule 7(a) covers an auction that was postponed by an order of court whilst r 7(b) covers an auction that was postponed because the reserve price was not reached;
- (b) under r 7(a), only 'remuneration' is payable and the amount is determined according to the discretion of the taxing officer. Learned counsel submitted that 'remuneration' must be taxed; and
- (c) under r 7(b), only 'commission' is payable. The amount is determined according to the scale of fees set out in r 5 of the Enactment where an auctioneer is only entitled to half of the full fee as determined pursuant to the scale of fees under r 5. In other words, there is a fixed scale fee for commission.

[6] Learned counsel further submitted that it is not disputed that the auction on 12 July 2007 was aborted by an order of the High Court on 11 July 2007. Thus, the auctioneer is only entitled to be paid 'remuneration' under r 7(a) of the Enactment, the amount of which is to be determined by taxation according to the discretion of the taxing officer. Taxation of the auctioneer's 'remuneration' under r 7(a) must comply with the provisions of the RHC particularly O 59 rr 20 and 21 and must also comply with established principles of taxation.

[7] To support his argument, learned counsel cited the following decisions:

- (a) *Public Bank Berhad v Er Cheng Chau* [1994] 4 CLJ 971;
- (b) *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Berhad, intervener)* [1995] 2 MLJ 421; [1995] 2 CLJ 846; and
- (c) *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi* [1997] 2 MLJ 118; [1997] 2 CLJ 409 (CA).

These are the only three reported cases or authorities on the Enactment.

SUBMISSION BY LEARNED COUNSEL FOR THE AUCTIONEER

[8] Learned counsel for the auctioneer submitted that the learned deputy registrar had applied the correct principle in awarding the auctioneer's remuneration when he exercised his discretion and taxed the auctioneer's remuneration and allowed the sum of RM118,007.50.

[9] In this instant case, the auctioneer had done everything for the preparation of the auction and was ready, willing and able to conduct the auction which was fixed on 12 July 2007. The auction was only aborted on

- A** the morning of the auction and as such, the auctioneer should be entitled to the remuneration as deemed fit by taxing officer under r 7(a). A proper guide for the taxing officer in this case is r 7(b) which states the remuneration which the auctioneer is entitled to if no sale takes place. The question that has to be answered is why should the auctioneer be entitled to anything less than if the
- B** auction had proceeded and if no sale took place? Learned counsel submitted that the learned deputy registrar was correct in being guided by r 7(b) in fixing the remuneration of the auctioneer in this instant case.
- C** [10] Learned counsel urged this court not to interfere with the discretion of the taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion correctly and after considering all the circumstances.
- D** [11] To support his submission, learned counsel cited the following decisions:
- (a) *Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146; [1973] 1 LNS 143;
- E** (b) *Chan Kok Choon JP v MBf Finance Bhd* [2001] 1 MLJ 5; [2000] 4 CLJ 453;
- (c) *Bar Council v Datuk Kanagalingam* [2003] 3 CLJ 697;
- (d) *Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors* [2002] 3 MLJ 705; [2002] 4 CLJ 259;
- F** (e) *United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd* [1991] 3 MLJ 181; [1991] 4 CLJ (Rep) 163;
- (f) *Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374; [1999] 7 CLJ 481;
- G** (g) *Vincent Cheng v The Minister For Home Affairs & Ors* [1990] 1 MLJ 449; [1992] 4 CLJ (Rep) 527;
- (h) *Sarjit Singh Kahira v State Public Service Commission* [2007] 8 MLJ 86; [2007] 5 CLJ 156;
- H** (i) *United Oriental Assurance Sdn Bhd v Penang Medical Centre Sdn Bhd* [1999] 2 MLJ 542; [1999] 2 CLJ 583; and
- (j) *MC Corbett v Ipoh Tin Dredging Ltd* [1936] MLJ 222; [1934] 1 LNS
- I** 46.

THE FINDING OF THE COURT

[12] To my mind, the only issue to be determined in the instant case is this:

Whether the learned deputy registrar has exercised his discretion correctly under r 7(a) of the Enactment. The relevant rule reads:

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- (a) Where the order for sale by public auction is cancelled or the sale is postponed by order of Court before the completion of the sale the remuneration of the auctioneer shall be at the discretion of the taxing officer.
- (b) Where property is put up by public auction but no sale takes place by reason of the reserve price not being reached the auctioneer shall receive half the commission which would have been payable under r 5 calculated on such reserve price, provided that where at one sale the reserve price on some lots is reached and the reserve price on the other lots is not reached the sale price of the lots sold shall be aggregated with the reserve price of the lots unsold and the rate of commission on both the lots sold and the lots unsold shall be based on the total of such sale and reserve prices so aggregated.

[13] It is not disputed by learned counsel for the proposed intervenor and auctioneer that r 7(a) is the applicable provision in this instant case. What is in dispute is what does r 7(a) entails. Counsel for the proposed intervenor had submitted that under r 7(a), the learned deputy registrar may only exercise his discretion in determining the 'remuneration' of the auctioneer by way of taxation. By taxation, it means taxation according to O 59 of the RHC and not according to r 7(b).

[14] Counsel for the auctioneer holds a contrary view. According to him, the learned deputy registrar had applied the correct principles when he used r 7(b) as a guide when exercising his discretion under r 7(a). This is because the facts of this case are almost identical to that under r 7(b) and as such, the learned deputy registrar cannot be faulted for using r 7(b) as a guide instead of using his discretion and allowing a sum without any sound basis.

[15] After carefully considered the submission advanced by learned counsel for the proposed intervenor and auctioneer, with respect, this court is in full agreement with the submission of learned counsel for the proposed intervenor that the learned deputy registrar had erred in using r 7(b) as a guide for the exercising of his discretion under r 7(a). Rules (a) and (b) are distinct and applies to different situations. In this instant case, the learned deputy registrar had failed to consider the distinct situations that require the application of r 7(a) and (b) of the Enactment. Rule 7(b) is only applicable where the auction was postponed because the reserve price was not met and the auctioneer is only entitled to half of the full commission payable. Rule 7(a)

A is applicable to an auction postponed pursuant to an order of the court and the remuneration payable is at the discretion of the taxing officer. The discretion under r 7(a) has nothing to do with the provisions of r 7(b).

B [16] It is settled law that in construing any statutes, the first task is to look at the words in the legislation and apply the plain meaning of the words in the statute and if there is no ambiguity to the words used, the court is duty bound to accept it even if it may lead to mischief. The rationale is simple. The court's duty is not to legislate, that duty lies with Parliament. If however the words used are not clear, then the courts may adopt the purposive approach in construing the meaning of the words used (see *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 1 CLJ 713; *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645; *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 169; *Yeo Peck Chie v KS Gill & Co* [1946] MLJ 131; *Maror & St Mellons Rural District Council v Newport Corporation* [1952] AC 189 (HL); *Woodward v Watt* (1853) 2 E & B 452 and *Warburton v Loveland* (1932) 2 D & CI (HL) 480).

E [17] In my considered opinion, r 7(a) of the Enactment is very clear. It did not provide that the taxing officer can 'fix' auctioneer's remuneration. All that it provides that the auctioneer's remuneration shall be at the taxing officer's discretion. Since the legislature used the word 'discretion of the taxing officer', it must mean that there must be a taxation. What else can a taxing officer do except to tax cost? It is pertinent to note that r 7(b) does not refer to any taxing officer. It merely fixes the 'commission' of the auctioneer. Taxation must be carried out according to established principles and shall have regard to various factors such as the properties involved, the time expended and whether any special skill was exercised. By cleaving rigorously to r 7(b) of the Enactment, the learned deputy registrar had fettered his discretion to consider judicially all circumstances which are relevant to the case. Each case have to be considered on its own merits and be subject to the taxing officer's own discretion. The principle is that a person or a body conferred with duties or with discretionary powers to make decisions may not avoid his or its duty or fetter himself or itself in the discharge of such duties. Such fettering of discretion may be by way of a fixed rule. By using r 7(b) as a guide, the learned deputy registrar may promote legal certainty and consistency in awarding auctioneer's fee, but he is fettering his discretion to consider or respond flexibly to unusual situations or to consider each case on its own merits (see generally, de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th Ed) paras 13–028, 1–01 and 11–004).

I [18] In *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener)*, Low Hop Bing JC (as he then was) had this to say:

In relation to the construction to be placed on r 7(a), it is my considered view that the discretion as stated therein cannot be exercised by stipulating a fixed sum viz RM100 without hearing the auctioneer, as each case has to be considered on its merits judicially and on established principles having regard to various factors such as the properties involved, the time expended and whether any special skill was exercised.

A

B

[19] Low Hop Bing JC's decision above was upheld by the Court of Appeal in *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi*. The Court of Appeal held that the registrar must exercise their discretion judicially. The practice of the Johor Bahru High Court by issuing a circular fixing the specific sum due to the auctioneer as his remuneration under r 7(a) was ultra vires the Enactment and has no effect. In other words, under r 7(a), the taxing officer cannot award cost under r 7(a) by merely and blindly using a fixed sum.

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D

[20] The case in point is *Public Bank Berhad v Er Cheng Chau*, where Low Hop Bing JC (as he then was) held that the remuneration of an auctioneer must be taxed and the word 'taxed' means the taxation of costs according to the provisions of the rules of the RHC particularly O 59 r 20 and 21. At p 976, the learned JC said:

E

Dalam penghakiman saya, perkataan 'taxed' dalam kaedah tersebut bermakna pentaksiran kos dengan mengikuti Kaedah-Kaedah Mahkamah Tinggi 1980, terutama A 59 kk 20 dan 21 yang memperuntukkan bahawa:

F

20 Sesuatu pihak yang berhak kepada penetapan apa-apa kos mestilah memulakan prosiding-prosiding bagi penetapan kos-kos tersebut dengan mengemukakan di pejabat pendaftaran bil kos dan suatu salinannya berserta dengan segala kertas dan baucar yang perlu.

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(1) Jika prosiding bagi penetapan telah dimulakan dengan sewajarnya mengikut kaedah 20, maka tertakluk kepada perenggan (2) kaedah ini dan kaedah 23, Pendaftar hendaklah memberi kepada pihak yang memulakan prosiding dan kepada mana-mana pihak lain yang berhak untuk didengar dalam prosiding penetapan itu, tidak kurang daripada 7 hari notis mengenai hari dan masa yang ditetapkan untuk penetapan.

H

(2) Sesuatu notis di bawah kaedah ini tidak perlu diberikan kepada mana-mana pihak yang belum memasukkan kehadiran atau mengambil apa-apa bahagian prosiding yang mengakibatkan prosiding penetapan itu:

I

A Dengan syarat bahawa perenggan itu tidaklah terpakai jika perintah penetapan bagi bil kos peguamcara yang dibuat di bawah Akta Profesion Undang-Undang 1976, atas permintaan peguamcara itu, mengakibatkan prosiding penetapan itu.

B Daripada segala affidavit dan lampiran-lampiran kepadanya, saya mendapati fee yang dituntut oleh defendan tidak dilakukan seperti yang dikehendaki oleh A 59, k 20 dan 21 tersebut, ...

I find no reason to differ from the above decision. Indeed, I am persuaded that His Lordship's reasoning is correct.

C [21] Learned counsel for the auctioneer submitted that this court should not interfere with the quantum allowed by the learned deputy registrar. It is the considered opinion of this court that the ground for review in this instant case is not limited to a question of quantum. In the case of *United Malayan Banking Corporation Bhd v Earnest Cheong Yong Yin* [2008] 3 MLJ 1; [2007] 2 CLJ 332, Nik Hashim FCJ had this to say:

E [4] On an application for review under O 59 r 36(5) of the RHC the judge may make such order as the circumstances require. By its terms the provision confers on the judge a discretion. But the discretion is not unfettered. It must be exercised judicially. The judge should not interfere with the taxing registrar's decision unless there is an error of principle or some other material error (*Diversey (Far East) Pte Ltd v Chai Chung Ching Chester & Ors (No 2)* [1993] 1 SLR 542; *Chan Kok Choon JP v MBf Finance Bhd* [2000] 4 CLJ 453) or the quantum allowed is obviously wrong (*Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146; [1973] 1 LNS 143) or the registrar has exercised his discretion capriciously or mischievously (*Corbett v Ipoh Tin Dredging Ltd* [1935] 1 LNS 33; [1936] MLJ 222 at p 224) see also *Malaysian High Court Practice*, 2001 Desk Edition 1 p 1933. Generally speaking, the discretion of the registrar on taxation is final (see judgment of Sir John Leach MR in *Alsop v Oxford (Lord)* (1833) 1 My & K 564, which was quoted with approval by Abdul Malek Ahmad FCJ (as he then was) in *Gooi Hock Seng v Chuah Guat Khim* [2001] 1 CLJ 583; see also *Llyods Bank plc v Ang Cheng Ho Quarry & Ors* [1993] 2 CLJ 210 where taxing officer on quantum will not be interfered with.

I [22] In my judgment, in this instant case, the learned deputy registrar had exercised his discretion capriciously or mischievously. He failed to take in account and/or erred in that:

(a) No proper bill of costs that meet the requirement of O 59 r 20 of the RHC was filed;

- (b) No evidence was provided to justify the cost claimed. This is especially so with the fee of RM117,507.50 claimed by the auctioneer; A
- (c) The auctioneer clearly prepared and submitted his bill of costs dated 16 July 2007 to claim for 'commission' which was only payable if r 7(b) applies. The reference in the bill of costs to r 5 of the Enactment which stipulates the full scale fees of commission payable to auctioneers for successful auction clearly proves that the auctioneer had used this as his basis for calculating the half portion of commission claimed by him. *The learned deputy registrar failed to realise that the auctioneer had in other words, not make any claim pursuant to r 7(a). On this basis alone, the auctioneer technically is not entitled to a single cent, particular the fee of RM117,507.50 claimed. The learned deputy registrar is not entitled under such circumstances to still award the auctioneer remuneration purportedly under r 7(a) by reference to r 7(b).* (Emphasis added.) B C
- (d) The learned deputy registrar clearly had fettered his discretion when he adopted the fixed half commission payable under r 7(b) and r 5 of the Enactment as the remuneration payable under r 7(a) to the auctioneer and claims that he had exercised his discretion thereby. He took the easy way out and used the half commission scale under r 7(b) and passed it off as exercising his discretion under r 7(a) to award the cost thereunder. The Court of Appeal in *Tan Beng Sooi* had clearly disapproved such a practice of stipulating a fixed sum as the remuneration under r 7(a) or any remuneration which is arrived at without conducting a proper taxation involving the judicial consideration of established principles and factors; and D E
- (e) In fact, no established factors were ever proved and thus, not considered. Established factors for ascertaining quantum of costs are for example: time expended, skills expended, amount involved, properties involved, where the transaction took place and so on. F
- In short, the learned deputy registrar had merely awarded what was billed by the auctioneer without a proper taxation. G

[23] However, this is not the end of the matter. There is another issue to be resolved. Learned counsel for the auctioneer submitted that the proposed intervener has no locus standi to participate in the taxation proceedings, let alone to challenge it. The argument of learned counsel is simply this: learned counsel for the intervener had submitted that taxation of costs must be done according to the provisions of O 59 rr 20 and 21 of the RHC, relying on *Public Bank Berhad v Er Cheng Chan*. Order 59 rr 21(2) states that the notice of taxation need not be given to any party who has not entered appearance or taken any part in the proceedings which gave rise to the taxation proceedings. In this instant case, the intended intervener is not a party to this proceedings as he had not obtained leave to intervene and had not taken any part in this proceedings. H I

A [24] In my considered opinion, the submission has no merit. The cost here affects the proposed intervener and he is disputing the cost. In *Tan Beng Soo's* case, Low Hop Bing JC clearly ruled that taxation according to O 5 rr 20 and 21 which is initiated by filing of bill of cost and of course the other party must be notified.

B [25] The proposed intervener should be given an opportunity of being heard because his rights will be affected by the learned deputy registrar's decision. In this instant case, it is not disputed that the proposed intervener's 'legal interest' is directly affected by the proceedings. The question is this: will the proposed intervener's rights or liabilities be directly affected in these proceedings. The answer is in the affirmative.

CONCLUSION

D [26] In conclusion, this court is of the considered opinion that the amount of award (RM118,007.50) was clearly a result of the application of the wrong principles and thus is devoid of any basis. What is glaring in this case was that the auctioneer submitted a bill of cost to claim 'commission' when all that he is entitled to was 'remuneration'.

E [27] At best, only the sum of RM851 for actual out of pocket expenses and RM804 pocket expenses and RM804 disbursement in the bill of cost are claimable but not the claim of RM118,507.50 which the auctioneer clearly claimed as 'Frees – Rule 5 of the Enactment' which the auctioneer was not entitled to.

G [28] For reasons above stated, the proposed intervener's application for review is allowed. The sum of RM118,007.50 to be set aside and only the sum of RM851 and RM804 is awarded. There is no order as to costs.

Application for review allowed with no order as to costs.

Reported by Kohila Nesan

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I